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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

FRED GABLE, CHARLIE HUTTER,
Petitioners,
vs.
STATE OF ALABAMA.

No. 749

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA, AND BRIEF IN SUPPORT THEREOF.

G. ERNEST JONES,
Counsel for Petitioners.

RODERICK BEDDOW,
Of Counsel for Petitioners.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

FRED GABLE, CHARLIE HUTTER,
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vs.
STATE OF ALABAMA.
No.....

SEPARATE AND SEVERAL PETITION FOR WRIT OF CERTIORARI.

The petitioners, Fred Gable and Charlie Hutter, separately and severally respectfully show to this Honorable Court:

A.

STATEMENT OF MATTER INVOLVED.

1. Each of your petitioners are citizens of the United States. They were each indicted along with Glen Towns and William Pritchett by the grand jury of Baldwin County, State of Alabama, Circuit Court in 1941. The indictment contained two counts, each count charging a capital felony, which might in the discretion of the jury be punished by death in the electric chair (Rec. p. 1).

There was conflict in the evidence as to whether robbery in fact was committed. Each of these defendants was

denied bail pending his trial upon the indictment and was lodged in the County Jail of Baldwin County. The trial began on December 2, 1941 (Rec. p. 3), and continued through December 5, 1941 (Rec. p. 74).

After the Court had completed his instructions in chief to the jury and while the jury was deliberating, each of these defendants was confined in the County Jail of Baldwin County. While they were so confined and on the 4th day of December, 1941, the jury was returned to the court room at about 2 o'clock in the afternoon. They had at that time been deliberating since the 3rd day of December, 1941. While the defendants remained in the County Jail absent from the court room, the Court proceeded in their absence as follows:

> "By the Court: Gentlemen, is there any question of law that is bothering the jury in any way? If so, I would be glad to assist you in any way I can.
>
> Juror: Your Honor, Judge, would it be all right for us to go ahead and reach a verdict on two, and then on one if we couldn't reach a verdict could we call a mistrial on that?
>
> The Court: You could; yes, sir.
>
> Juror: On the other hand, if we reach a verdict on one could we call a mistrial on the other two?
>
> The Court: Yes, sir. Anything else?
>
> Juror: No, sir.
>
> The Court: All right, you may retire" (Rec. p. 74).

To this conduct of the Court in the absence of the defendants, counsel for the defendants noted an exception (Rec. p. 74).

The verdict of the jury and judgment of the court was adverse to each of these defendants and the punishment of each defendant was fixed at ten years in the Penitentiary of the State of Alabama (Rec. pp. 105-106-99).

2. Appeal was duly perfected to the Court of Appeals of the State of Alabama, the certificate of appeal appearing as the first unnumbered page of the record.

Judgment was rendered by the Court of Appeals on June 15, 1943, affirming the judgment of the Circuit Court of Baldwin County (Rec. p. 108). The opinion of the Court of Appeals appears in the record at page 109 et seq.

Application to the Court of Appeals for a rehearing was duly and timely filed on June 29, 1943, by each petitioner (Rec. pp. 118, 119). This application for a rehearing was overruled by the Court of Appeals on October 5, 1943 (Rec. p. 119).

Petition to the Supreme Court of Alabama for writ of certiorari to the Court of Appeals was filed by each petitioner on the 19th day of October, 1943 (Rec. pp. 120-123, incl.).

The petition for writ of certiorari was by the Supreme Court of Alabama denied on Thursday, October 28, 1943 (Rec. p. 124), the opinion of the Supreme Court appearing on record page 125.

The petitioners filed application to the Supreme Court of Alabama for a rehearing on November 11, 1943, which application for a rehearing was denied on Thursday, December 2, 1943 (Rec. p. 127).

Notice of intention to apply to the Supreme Court of the United States for review and application for stay of execution was filed in the Supreme Court of Alabama on Friday, December 3, 1943, and was by the Court granted and execution of sentence stayed pending final disposition of these causes by the Supreme Court of the United States upon application for writ of certiorari timely filed by petitioners (Rec. p. 131).

B.

STATEMENT OF JURISDICTION.

1. This Court has jurisdiction to grant the relief prayed because this is a case wherein there is drawn into question the validity of trial procedure in a state court under the Constitution of the United States and particularly the 14th Amendment thereto, during a part of the proceedings of which trial, the defendant, being charged with a felony punishable by death, was detained in the county jail without bail and was absent from the court room during a period of time when the Court was proceeding with the trial by giving certain instructions to the jury. The decision of the highest court of the State of Alabama to which this defendant could appeal as a matter of right being adverse to his contention that a criminal trial for a capital offense conducted for any period of time, however brief, while the defendant is detained by the Sheriff in the county jail is a violation of the guarantee contained in the 14th Amendment that the defendant shall not be deprived of his life, liberty, or property without due process of law.

2. The Act of Congress of February 13, 1935, Section 247B, 28 U. S. C. A., Section 344, page 205, authorizes review by the Supreme Court of the United States by writ of certiorari

> "where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution"

in that each of these petitioners claim the right to be present during each and every moment from the beginning of their trial upon a capital felony until the trial is ended by the entry of a final judgment and claim that this right was denied to them when the Court instructed the jury during their involuntary absence and claim that this right

to be present is guaranteed to them by the due process clause contained in the 14th Amendment to the Federal Constitution.

3. The judgment which this petitioner prays this Court to review was rendered by the Court of Appeals of Alabama on June 15, 1943, affirming the judgment of the Circuit Court of Baldwin County (Rec. p. 108). The opinion of the Court of Appeals appears in the record at page 109 et seq.

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4. The constitutional questions here raised are serious and not frivolous. They involve the right of a defendant charged with a capital felony to be present at every stage of his trial.

And the purpose of the petitioner is to show that it is a denial of due process of law to conduct a trial in a capital case without strict observance of and in violation of this fundamental right, and it is the further purpose of the petitioner to show that there was not a scintilla of evidence in the record upon which the Court of Appeals could base a finding that this petitioner, through his attorney, had waived his right to be present at every stage of the trial including instructions to the jury or had by his failure or had by any conduct of himself or his attorney estopped himself from claiming or asserting his objection thereto.

C.

THE QUESTIONS PRESENTED.

1. (a) The Court of Appeals of Alabama has by its decision affirmed a judgment of conviction in a capital case rendered as the product of a trial in which this petitioner was denied the benefit of due process of law in that said trial was not conducted according to the due course of regular procedure provided by law in the State of Alabama, the defendant being involuntarily absent at a time when the Court was instructing the jury while they were deliberating upon his fate.

A copy of the entire record in this case, certified to be correct by the Clerk of the Court of Appeals of the State of Alabama and the Clerk of the Supreme Court of the State of Alabama is hereby furnished, attached to, and made a part of this application in compliance with Rule 38, Paragraph 1, of the Rules of this Court.

(b) The Court of Appeals of Alabama has decided a federal question of substance not heretofore determined by this Court, or has decided it in a way not in accord with the applicable decisions of this Court.

(c) The Court of Appeals, by its decision in this case, has denied to this petitioner a right guaranteed by the Federal Constitution, namely, the right not to be deprived of his life, liberty or property except upon a trial conducted in accordance with the principles of due process of law pursuant to the guarantees contained in the Fourteenth Amendment to the Federal Constitution.

(d) And each of your petitioners says that said petitioner is not guilty as charged in said indictment; that he verily believes that but for the violation of his constitutional rights, privileges and immunities as hereinbefore set forth, the result of the trial in the court below would have been favorable to him and that the verdict as rendered against said petitioner is the product of a trial wherein his rights were prejudiced by the erroneous conduct of the trial as hereinbefore set forth in violation of his rights as a citizen of the United States, guaranteed to him by the aforementioned provisions of the Constitution of the United States.

D.

PRAYER FOR THE WRIT.

Wherefore each of your petitioners pray separately and severally that a separate and several writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals of Alabama commanding that Court to certify and send to this Court for a review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and titled Docket No. 1, Division 442, Fred Gable and Charlie Hutter v. State of Ala-

bama, and ex parte Fred Gable and Charlie Hutter, and that the judgment of the Court of Appeals of Alabama may be reviewed by this Honorable Court and that your petitioners may have such other and further relief in the premises as unto this Honorable Court may seem meet and just; and your petitioners will ever pray.

FRED GABLE,

By G. ERNEST JONES,
Counsel for Petitioner.

CHARLIE HUTTER,

By G. ERNEST JONES,
Counsel for Petitioner.

RODERICK BEDDOW,
Of Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

FRED GABLE, CHARLIE HUTTER, Petitioners,
vs.
STATE OF ALABAMA.
No.....

SEPARATE AND SEVERAL BRIEF OF PETITIONERS
In Support of Petition for Writ of Certiorari.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Court of Appeals of Alabama was rendered by the Court of Appeals on June 15, 1943 (Rec. p. 108 et seq.), and appears attached hereto as Appendix A.

II.

JURISDICTION.

1. Statutory jurisdiction for this petition is founded upon the provisions of the Act of Congress of February 15, 1925, to wit, 28 U. S. C. A., Sec. 344, pages 205-206.

2. The date of the judgment of the Court of Appeals of Alabama is June 15, 1943; certiorari was denied by the

Supreme Court of Alabama October 28, 1943 (Rec. p. 124), the opinion of the Supreme Court being attached hereto as Appendix B. Rehearing was denied by the Supreme Court of Alabama on December 2, 1943 (Rec. p. 127).

3. The nature of this case and the rulings below bring the case within the jurisdictional provision of Title 28, Sec. 344, U. S. C. A., supra. Claim of right guaranteed by the Federal Constitution was presented by exception to the Court's conduct in the matter of instructing the jury during the enforced involuntary absence of the petitioner by noting an exception (Rec. p. 74) and by renewal of the exception after defendants were brought from the jail into the court room and the Court had continued instructions in their presence (Rec. p. 75). This claim of said constitutional rights and immunity is apparent on the face of the record filed in the Court of Appeals upon which the appeal of each of these petitioners was heard and the federal question being apparent on the face of the record was presented to the Court of Appeals by virtue of the statute of Alabama which requires the Court to consider all questions apparent on the record or reserved by bill of exceptions (1940 Code of Alabama, Title 15, Article 3, Section 389), which is attached hereto marked "Appendix C." It was also raised by vigorous argument on the part of counsel for petitioners in the Court of Appeals, which argument does not appear of record. The Federal right claimed separately by these petitioners is that they were denied due process of law in their trial in that

(a) the Court instructed the jury during petitioner's enforced involuntary absence and while petitioner was detained in jail under process of the Court.

III.

STATEMENT OF THE CASE.

Each petitioner was charged with robbery as defined by Title 14, Chapter 74, Section 415 of the 1940 Code of Alabama, which reads as follows:

> "Punishment of Robbery.—Any person who is convicted of robbery shall be punished, at the discretion of the jury, by death, or by imprisonment in the penitentiary for not less than ten years."

An essential element of this offense is that the taking must be accompanied by violence or putting in fear which must proceed or be concomitant with the act by which the property is acquired against the will of the owner or possessor. (Vide notes to Title 14, Section 415, Code of Alabama 1940.) The defense made by petitioner was that the taking was by consent of the possessor and that the apparent display of force was a sham or pretext; that there was collusion between the alleged "victim" Eades and the petitioners, by which collusion they were to pretend that a robbery was occurring in order that the real owner of the money might be hoodwinked into believing that his trusted employee, Eades, had in fact been robbed notwithstanding the arrangement was collusive and Eades himself was to share the spoils. There was strong substantial evidence to support the contention of the petitioners and the only denial came from the lips of the alleged victim Eades. The jury very evidently had serious doubt which they evidenced by the infliction of the lowest penalty prescribed by the statute — ten years imprisonment. It is their contention that the conduct of the Court in and about instructing the jury at a time when the petitioner was involuntarily absent from the court room detained in jail by process of the Court was a denial of due process of law, and it is their contention that this denial of due process of law infringes their right guaran-

teed to them by the Fourteenth Amendment to the Constitution of the United States not to be deprived of their life, liberty or property except by due process of law, and renders the judgment a nullity.

IV.

ERRORS ASSIGNED.

1. That the courts of Alabama erred in holding that it did not constitute reversible error as being a denial of due process of law for the Court to instruct the jury during the enforced absence of petitioner while detained in jail under process of Court.

2. That the courts of Alabama deprived the petitioner of the protection of the due process of law clause of the Fourteenth Amendment by affirming a judgment rendered at a trial during which trial the defendant was compelled to be absent by process of the Court while the Court instructed the jury.

V.

ARGUMENT.

POINT I.

It is denial of due process of law for the Court to instruct the jury in a capital felony trial at a time when the defendant's presence in court is prevented by his being detained in jail by process of the selfsame court.

Lee v. State, 13 So. (2d) 583, 587;
Lee v. State, 13 So. (2d) 591;
State ex rel. Battle, 7 Ala. 135, 138;
14 American Jurisprudence, p. 899, Para. 190, and notes thereto;
Shields v. U. S., 273 U. S. 53, 71 Law. Ed. 787, 47 Supreme Court 478;
Diaz v. U. S., 223 U. S. 442, 56 Law. Ed. 500, 32 S. Ct. 250;
Article 1, Section 6, Constitution of Ala. 1901;
Wade v. State of Ala., 92 So. 101;
Kinnemer v. State, 49 Western Reports 815;
16 C. J. 813, Sec. 2066;
16 C. J. 814-15, Sec. 2067;
Cook v. State, 60 Ala. 39;
Ex Parte Bryan, 44 Ala. 402;
Wells v. State, 41 So. 630;
Harris v. State, 49 So. 458;
Bell v. State, 44 Ala. 393;
Kilgore v. State, 27 So. 4;
Andrews v. State, 34 Tenn. 540;
State v. Barnes, 59 Missouri 159;
Rolls v. State, 52 Miss. 391;
Nolan v. State, 55 Ga. 521;
21 American Reports 281;
Holton v. State, 2nd Fla. 276;
Jackson v. Commonwealth, 19 Gratt. 664;
Dutton v. State, 123 Md. 373, 91 A. 417;
Snyder v. Mass., 291 U. S. 97, 78 Law. Ed. 674, 54 S. Ct. 330, 9 A. L. R. 575;

Lewis v. U. S., 146 U. S. 370, 36 Law. Ed. 1011, 13 St. Ct. 136;
Schwab v. Berggren, 143 U. S. 442, 36 Law. Ed. 218, 12 S. Ct. 525.

In the case of Lee v. State, 13 So. (2d), at page 587, the Court of Appeals of Alabama said:

> "The almost universal rule is—and in Alabama the law has always been—that 'the right to be present during the trial of an indictment for felony cannot be waived by an accused in a capital case.'" Lee v. State, 13 So. (2d) 583, 587.

And again in the same case the Court says:

> "The record must affirmatively show prisoner's presence at each successive step in the trial." Lee v. State, supra.

The decision of the Court of Appeals of Alabama in the Lee Case, supra, was especially concurred in by the Supreme Court of Alabama in the case of Lee v. State, 13 So. (2d) 590; it is the law of Alabama supported by a long line of decisions rendered by the courts of last resort of the State of Alabama.

The Court, acting through its Sheriff and its process detaining this petitioner in jail against his will, denying to him the right to be present while the Court was proceeding to instruct the jury, was a denial to him of a trial conducted according to the **law of the land** and amounted to a denial of due process of law since the right to be present at his trial is an essential element of due process.

In the case of Wade v. State of Alabama, 92 Southern 101, the Supreme Court, speaking through Mr. Justice Anderson, said:

> "It is an elementary rule that, if possible, effect should be given to every part and every word in Constitutions, as well as statutes, unless there is some clear

reason to the contrary; and no portion of the fundamental law should be treated as superfluous. Hence as a general rule, the Court should avoid a construction which renders provisions meaningless or inoperative."

"To hold that the Court could exclude the public generally in cases is not mentioned in Section 169 of the Constitution would, in effect, emasculate said Section, and convict the framers of our present Constitution of a vain and useless act in the insertion and adoption of said Section."

"Section 6 of the Constitution of Alabama is practically taken from the Constitution of the United States."

"We do not think that the defendant had to object at the trial to the denial to him of his constitutional right, which affirmatively appears upon the records sent to the Court of Appeals if he was charged with and convicted for a felony, and it is questionable whether he could have expressly waived these rights, to say nothing of an implied waiver."

It is error for a court, in the absence of accused, at the jury's request, to re-read his instructions, though they are read actually as first given, since a defendant has a right to know that such was the case and to be present for that purpose.

Kinnemer v. State, 49 Southwestern Reporter 815.

We quote from the opinion of the above cited case as follows:

"The record shows that, after the case had been submitted to the jury and after being out several hours, the jury came into the court room, and asked to be reinstructed; whereupon the court, the defendant being in jail, and not voluntarily absent, re-read the entire instructions exactly as first given to them. The record does not show that even defendant's counsel were present when this was done. The fact that the jury asked 'to be reinstructed' shows that they

did not comprehend the charge of the court when first delivered. The re-reading of the instructions was tantamount to instructing them originally, or for the first time, because the first time the instructions were read they were not understood. There is no more important or material step in the progress of a trial than instructing the jury. Even had the record showed affirmatively the presence of defendant's counsel, still they could not waive his presence while the jury was being instructed. The instructions could not be re-read in his enforced absence, for, although they were read 'exactly as at first given,' the defendant had the right to know and see that such was the case, and to be present for that purpose." Brown v. State, 24 Ark. 620; Bearden v. State, 44 Ark. 331.

"By express constitutional or statutory provision in many states, and at common law in the absence of a statute, it is essential to a valid trial and conviction on a charge of felony that defendant shall be personally present, not only when he is arraigned, but at every subsequent stage of the trial, unless he may and does waive his right to be present." 16 C. J. 813, Sec. 2066.

"As a general rule the presence of defendant during a trial for felony must appear from the record, and generally such presence cannot be presumed; but if the record shows defendant's presence at the commencement or at any other stage of the trial, his presenec during subsequent stages thereof will be presumed, in the absence of evidence to the contrary, although this fact is not formally stated. A failure of the record thus to show the personal presence of defendant during the trial will work a reversal of the judgment of conviction. Where, however, defendant was in fact present and the record fails to show such presence, the apparent error may be corrected by amending the record."

16 C. J. 814, Sec. 2066.

"According to this rule, common law or statutory, it has been held that, unless waiver is permitted and made, defendant must be present at the arraignment

and plea; at the impaneling and swearing of the jury; at the discharge of the jury because of the sickness of a juror, or because of inability to agree; when witnesses are sworn and put under the rule; during the examination of a witness as to competency; during argument and determination as to the competency of a witness; or during the examination of witnesses or the reception of other evidence, and it has been held that this error is not cured by excluding the evidence taken in defendant's absence and by causing it to be repeated in his presence, although there are cases which hold the contrary. Defendant should also be present during the argument of counsel; when the case is finally submitted to the jury; when the court charges the jury and when they are recharged or given additional instructions after retirement; and when sentence is pronounced; but it has been held that this rule is not violated where the judge, in the absence of defendant, communicates with the jury as to matters which do not affect the interest of defendant which the jury are to consider." 16 C. J. 814-15, Sec. 2067.

There are certain inalienable rights secured by our Constitution to every defendant, and if violated the error cannot be corrected. The fact that the Court reinstructed the jury, though it may have done so in the exact language used in instructing the jury in the absence of the defendants, **is sufficient reason for the Court to set aside the verdict of the jury and the judgment of the Court in this case.** In support of this contention we cite the case of Cook v. State, 60 Ala. 39.

"It was not within the authority of prisoner's counsel to waive for him his right to be present when the verdict was returned. It seems to have been supposed that if there was error in receiving the verdict under the circumstances, it was not beyond correction; and, therefore, the persons of whom the jury was composed were reassembled about five minutes after they had been discharged; and two of them having been out of

the court room, they were sworn, and under oath declared that they had not conversed with anyone in regard to the case. But, if the jury could then be reconstituted to render a verdict which was the result of former deliberations, why should not the other ten jurors have been also examined under oath, as their companions were? They also could have communicated about the case with persons in the courthouse, during the same five minutes after they were discharged; and it was quite as necessary that they should have been purged on this subject, as that the two should be. **We think there was no virtue** in such an interrogation of any of them." Cook v. St., 60 Ala. 39.

"In a case of felony the prisoner has a right to be present in court when the jury return their verdict; which right is not waived by the failure of his counsel to object to the verdict being received in his absence, nor can it be waived by them. If the verdict is received in his absence, it is void; and the error cannot be cured, after the jury have been discharged, by immediately reassembling the jurors, examining on oath those who had left the court room, and again receiving the verdict in the presence of the prisoner."

Cook v. St., 60 Ala. 39.

It is the right of the accused to be present in all criminal prosecutions in the courts of this state, to be heard by himself and counsel, or either, and for this purpose he must be present in court, whenever any action is taken in the prosecution.

In the case of Ex Parte Bryan, 44 Ala. 402, the Supreme Court, speaking through Mr. Justice Peters, among other things, said:

"The constitution of the State is a pledge of protection to the rights it secures to every citizen. This instrument requires 'that in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either.' The import of the word 'prosecu-

tion,' in this section of the fundamental law, is to carry on or accompany a criminal suit in the courts of the State, from the beginning to the end of the procedure. Such is the legal, as well as the etymological force of the word. Then, in every step of the proceeding, which constitutes the prosecution, in which there is any action in which the accured has a right to be heard, he has the right to be present and to be heard by himself and counsel, or either. This right is without any limit, and without any exception, when the step is not one of mere discretion in the court; such as a continuance, when the accused fails to be present, and orders of a like character. This is a constitutional provision in his favor, and cannot be disregarded by the court. The court is bound by the most solemn obligation to support and defend it. The State v. Hughes, 2 Ala. 102, 104 (36 Am. Dec. 411); Henry v. The State, 33 Ala. 389; Hall v. The State, 40 Ala. 698; 1 Bish. Cr. Proc., p. 684; Const. Ala., Art. 15. Then the circuit court erred in making the order to remove the trial of the case of the State v. Bryan, to the county of Montgomery, without the presence of the accused in court, to be heard upon it, if he chose. Rev. Code, Sec. 4206, 4207; Ex Parte Chase, 43 Ala. 303; Bryan v. State, 43 Ala. 321, 323. This was such an order of the court as could not have been corrected, if wrong, by appeal, but only by mandamus. Bryan v. State.

"No doubt that a party, after making an application for a removal of the trial to another county, may abandon it, or may have it rescinded before the trial is actually removed, as he could any other interlocutory order, during the term of the court at which the same was made, before its adjournment.

"The learned judge, under the order of this court, would have acted very properly in making the order for the removal of the trial to the county of Montgomery, had the accused been in court by himself and counsel, or either, to have been heard upon the order when it was made. The error was not committed in sending the case to Montgomery county, but in making the order in the absence of the accused from the court.

"The answer of the learned judge of the circuit court to the order nisi of this court, would be sufficient if it showed that the order of this court had been complied with, or that the accused had abandoned his application for the removal of the trial, and consented to be tried in the county where the indictment was found." 44 Ala. 402.

"Where, in a prosecution for either a felony or misdemeanor, the verdict was received in the absence of the defendant and the jury were discharged, such proceeding operated as an acquittal **and could not be cured by the reconvening of the jury after accused appeared in court and after they had dispersed, but after the verdict was read.**"

Wells v. State, 41 So. 630;
Harris v. State, 49 So. 458;
Bell v. State, 44 Ala. 393;
Kilgore v. State, 27 So. 4.

"It is not only the right of a prisoner to be present in every stage of criminal prosecution against him for a felony, but the general rule is that his presence is indispensably necessary in such cases, particularly in capital ones, during the whole trial and until final judgment."

Andrews v. State, 34 Tenn. 540;
State v. Barnes, 59 Mo. 139;
Rolls v. State, 52 Miss. 391.

"The prisoner's presence is required during the impaneling of the jury, the taking of testimony, the rendition of the verdict, and the prisoner's right to be present at every stage of his trial for a felony is one **which cannot be denied him.**"

Nolan v. State, 55 Ga. 521;
21 Am. Rep. 281.

"To deprive defendant of his inalienable right and to convict him by pursuing any other cause, is to dispose of his case in a manner not authorized 'by due course of law.'"

Holton v. State, 2 Fla. 276.

"The better opinion is that in a trial for a felony the defendant cannot waive his right to be present during all the proceedings."

Jackson v. Commonwealth, 19 Gratt. 664.

POINT II.

The right to be present at every stage of the trial is a right which cannot be waived by counsel for defendant in a capital case.

Lee v. State, supra;
Lee v. State, supra;
And other authorities cited in support of Point I.

The Court of Appeals of Alabama in its decision recognized the right of this petitioner to be present while the Court was proceeding to instruct the jury, but sought to avoid the effect of that absence by holding that counsel for defendant waived by acquiescence the right of defendant to be present while the Court was instructing the jury, in the following language:

"Manifestly, when the court and jury were first consulting, defendant's counsel were aware of the absence of defendants from the court room, though the trial court was not. It was, therefore, incumbent upon counsel to have the court informed as to this, and not sit quietly by and then reserve an exception to the court's constitutional action. There is no merit in the exception reserved under the facts and circumstances hereinabove detailed."—Opinion Court of Appeals, Appendix A.

The Court of Appeals cites as authority for this holding the case of Ferguson v. State, 137 So. 315, which citation is inapt. The defendant in the Ferguson Case, before entering upon his trial, made a motion to quash the venire, etc., but was not present while the Court was considering

the motion to quash the venire; the Court overruled the motion to quash the venire in the absence of the defendant Ferguson, but discovering defendant's absence, being under the impression that defendant should be present, he announced that he was

"going to do it all over."

The motion to quash was not a part of the trial. It was a preliminary proceeding **before trial began.** This distinction was definitely drawn by the Court of Appeals in its opinion. The Court of Appeals based its affirmance of the judgment of the trial court below upon its finding as follows:

> "It affirmatively appears that the defendant was present at every stage of the trial."—Ferguson v. State, supra.

And specifically held that the motion to quash constituted "preliminaries" to the trial.

The attempt of the Court of Appeals to establish a waiver on part of counsel for defendant ignores the law of Alabama as declared in the Lee Case, supra, wherein it is positively held that counsel cannot waive the right of a defendant in a capital case to be present at every stage of the trial.

The finding of fact on the part of the Court of Appeals, upon which it bases its decision that counsel waived petitioner's right to be present while the Court was instructing the jury, has not a scintilla of foundation in the record. For aught that appears in the record counsel for defendant had but appeared at the moment when he interposed his exception to the conduct of the Court in instructing the jury while defendant was absent in a capital case. These proceedings occurred twenty-four hours after the jury had retired and while the court had been in continuous recess

so far as this case was concerned. There is not a word in the record to show that counsel for defendant had arrived at this recess session of court one instant before the moment when he interposed his objection to proceeding in the absence of defendants.

Neither is there a word in the record from which the Court of Appeals is authorized to find that the trial court was not aware of the absence of defendants while he was proceeding to instruct the jury. It was the solemn and sacred duty of the Court to ascertain the presence of defendants before proceeding with the trial. The presumption would be that the court below either failed to perform its solemn duty to ascertain that defendants had been brought from the jail to the court room before proceeding with his instructions to the jury, or that the Court erroneously and in denial of due process of law to petitioner proceeded without regard to their presence.

POINT III.

The violation of a substantial constitutional right is conclusively presumed to be injurious in a trial for a capital felony.

Lee v. State, and other cases cited supra in support of Point I.

It will be observed that in the Lee Case, supra, the Court of Appeals held that, notwithstanding their reluctance to be compelled to reversal by the violation of the constitutional right of the defendant in a capital felony to be present at the time of the rendition of the verdict, the mere fact of such violation compelled a reversal. This opinion, in so far as it related to a capital felony, was emphatically concurred in by the Supreme Court in Lee v. State, 13 So. (2d) 590. Many other cases are to the same effect. The error cannot be dismissed upon the ground that it is error without injury since it is a matter of such

high public concern that the constitutional safeguards surrounding a trial of a citizen upon a capital charge be observed to the strict line.

> "The argument, however, extends beyond those statutes and cites the broad public interest in life or liberty of a person and his welfare which the state entertains." Lee v. State, 13 So. (2d) 590, 593.

Nor can the error be cured by sending to the jail and getting the defendants and bringing them into open court and there again rehearsing what has gone on in their absence. A defendant upon trial for a capital felony has an absolute right to be present at every stage of the proceedings from the beginning to the end of his trial—from the time issue is joined upon plea of not guilty until the verdict of the jury is rendered and sentence pronounced. This right is guaranteed to him by the Constitution in order that he may by the evidence of his own five senses have **knowledge** of the proceedings and opportunity to discuss questions of law and fact which may arise as distinguished from merely **being informed** as to what proceedings have occurred with regard to certain phases of his trial. The high quality of the verification given to the information furnished to him as to what proceedings have been taken in his absence **cannot be the equivalent of knowledge.** The rehearsing of the proceedings taken in his absence amounts, so far as he is concerned, to no more than **mere information**, which is not the equivalent of **knowledge.** Once this constitutional safeguard is broken down, it is but an easy step to the old star chamber trials employed by tyranny as its instrument of oppression. This right to be present at every stage of the trial is so sacred that it has been a part of every Constitution of the United States and of the State of Alabama. This right to be present at every stage of the proceeding is so sacred that a judgment of conviction is a nullity in Alabama

which does not so recite. This was recognized by the State of Alabama in the instant case. The original record filed in the Court of Appeals contains the original judgment entry at page 99 of the record. This original judgment entry does not recite that the defendants were present throughout the trial. Certiorari to the court below was granted upon motion of the State (Rec. pp. 104-105), and in response to that writ of certiorari the Clerk of the Circuit Court sent up what purports to be this judgment entry, which apparently was not in the record on the 30th day of October, 1942, when the Clerk of the Circuit Court of Baldwin County certified the original record (Rec. p. 103). This judgment entry (Rec. pp. 105-106), certified by the Clerk of the Circuit Court of Baldwin County under date of April 19, 1943 (Rec. p. 107), does recite that the defendants

> "All being present in open court at each and every stage, and during all the proceedings in this cause" (Rec. pp. 105-106).

The insertion of this clause in the judgment is essential to its validity. Without this clause being in the judgment habeas corpus would lie upon the ground that the judgment was a nullity. Yet the record itself shows that this recital in the judgment is untrue. The record of the trial shows without dispute by the very admission of the Court itself that these defendants were in jail and absent from the court room while the Court was proceeding to instruct the jury (Rec. p. 74). The judgment is thus falsified by the very record which must support the judgment if the judgment is to be supported. It is respectfully urged upon the Supreme Court of the U. S. that a trial conducted in denial of due process of law, and particularly where that due process of law is denied in a capital case, and constitutes a denial of a right guaranteed by both the federal and state constitutions, injury must be conclusively presumed.

CONCLUSION.

It is respectfully submitted to the Supreme Court of the United States that these petitioners are entitled as of right to have the judgment rendered in the trial court against them vacated and set aside for and on account of the fact that said judgment is a product of a trial conducted in violation of the guarantee contained in the Fourteenth Amendment to the Federal Constitution that no citizen shall be denied life, liberty or property without due process of law.

So confident is each petitioner that his innocence will be declared by a jury when tried again that he earnestly seeks the opportunity of submitting his case again to a jury notwithstanding the fact that in so doing he stakes his life upon the sound discretion of the next jury which shall try his case.

Respectfully submitted,

G. ERNEST JONES,
Counsel for Petitioners.

RODERICK BEDDOW,
Of Counsel for Petitioners.

APPENDIX A.

The State of Alabama—Judicial Department.

The Court of Appeals of Alabama.

October Term, 1942-43.

1 Div. 442

Fred Gable and Charlie Hutter

v.

The State.

Appeal from Baldwin Circuit Court.

November 7, 1942

Transcript Filed.

November 12, 1942

It is ordered that this cause be and the same is passed to the call of the Third Division.

December 17, 1942

It is ordered that this cause be and the same is continued by consent.

April 22, 1943

Come the parties by attorneys, and argue and submit this cause for decision.

June 15, 1943

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the appellants pay the costs of appeal of this Court and of the Circuit Court.

Bricken, Presiding Judge.

From a judgment of conviction for the offense of robbery, this appeal was taken.

The robbery, complained of in the indictment, was to the effect that the two above named appellants, together with one Glen Townes, and William Pritchett, feloniously took $1711.00, (properly described), the property of Reuben Augustus Eades, from his person, and against his will, by violence to his person, or by putting him in such fear as unwilling to part with the same, etc.

The indictment was proper in form and substance, and no objection by demurrer or otherwise was interposed.

The defendant, William Pritchett, demanded, and was granted, a severance. The three remaining defendants, in answer to the indictment, plead not guilty. The trial in the court below resulted in the conviction of Gable and Hutter, who were each sentenced to a term of imprisonment in the penitentiary of ten years. Defendant, Townes, upon said trial, was acquitted by the verdict of the jury, on the question of mistaken identity.

The evidence for the State made out the case in its every detail as charged. Eades, the alleged injured party, testified, among other things, that on June 12, 1941, at about one o'clock (day he left Fairhope, his home, in a car accompanied by a young woman, Miss Patricia McFall, to go to Mobile, some miles distant. After thus travelling for about a mile from the limits of Fairhope, someone pulled up to the side of me. When the car pulled up side of me, the first I noticed was I heard somebody say something, and I looked to the side and saw these three men with two of them out the window with guns. The car came up from behind like it was going to pass me. I heard the car and then I heard them say something. I heard them speak. That was the first thing that drew my attention. When I looked around I saw Gable hanging out the front window of the car with a pistol in his hand and

Townes out the back window. I did not know either of these three defendants at the time. I did not know their names. I have since learned their names in connection with the preliminary hearing and seeing them. All three of these men were in that car at the time. Hutter was driving the car which was a Ford, 1941 Ford, two-door sedan. I say Mr. Hutter, the defendant there, was driving the car. Mr. Gable, the man back behind there, was sitting on the front seat by Mr. Hutter. Mr. Townes was on the back seat. No one besides those three men were in the car. They were telling me to stop and I did stop. When I stopped the car two of them, Gable and Townes, got out and came to my car. The two cars were stopped together and they immediately jumped out of their car and came to my car, and Townes got in the front seat of my car and Gable at the same time come over and they told me to "lay your head in the girl's lap." They had weapons with them when they got out of the car. The defendant Gable had a nickle plated pistol. Mr. Townes, the nearest one to me, had a blue or black looking gun—a blue or black dark gun. When they came over to me they had those guns out. The first thing said was Gable told me to lay my head in the girl's lap. After he said that Townes got in the front seat and Gable got in the back seat. Gable first ordered me to lay my head in the girl's lap. The car had four doors and the girl was sitting to my right, and Gable was the one that told me to put my head in her lap. I obeyed the order. They both got in the car practically at the same time and Townes drove the car off. Townes got in the car side of me and Gable on the back seat. At first, immediately after they got in the car Gable reached over the seat and reached in my pocket and said, "We are going to take your money." And so he took the money out of my pocket. Mr. Gable reached from the back seat over and got my money and Townes was sitting in the car at that time. The car was standing still. I saw Mr.

Gable with that pistol at that time. He had the one I called the shiny pistol drawn on me at that time. I did not part with the money willingly but I had to. I did not consent to him taking the money. $1700.00 was taken from me. The whole $1700.00 was in currency. He reached over the seat to get to me and he had his pistol drawn at that time. When they took the money Townes asked Gable, "Are we going to take them somewhere or leave them here?" And he said, "We will take them somewhere." He started the car and drove the car down the road something like a mile or maybe a little further, I don't know exactly how far, and they first started to pull off the road to the right and so he drove the car off the road, and Gable on the back seat said to him: "Don't go up there, there's a house up there." And he backs the car out on the highway and goes down the road about 150 feet and turned to the left. The road he turned off on was just a side road and it went towards the bay. We went down that road, I imagine, something over a quarter of a mile. When we got down there, Gable asked me if I had another key to the car with me and I said, "No, I have another one at home," and he said, "Well, do you have a pistol," or I believe he said, "Do you have a gun," and I said no, and he said, "Do you have a watch?" and I said yes, and he said, "What time is it?" and I said "17 minutes after one," and he said, "Stay here for twenty minutes and you can leave and you will find your keys on the highway." And so he took the key from out of the car and they left and evidently went back to the highway. They left walking; I might say trotting. They left hurriedly on foot. I couldn't see the other car. I think I heard the car when it started off on the highway but I couldn't see it. I had my head down inside the car. They told me to remain there twenty minutes and I stayed there twenty minutes. From there, I went back to Fairhope. I made a report of what happened immediately when I got back to Fairhope. I next saw these three defendants in Montgomery on Mon-

day morning after the Thursday afternoon my money was taken. They were in jail at Montgomery. I observed all three of them there at that time. These are the three men that were present there, Glenn Townes, Charlie Hutter and Fred Gable, when they took my money. It happened in Baldwin County, Alabama, that place where I parted with my money. I identified these men there in Montgomery in the jail. I identified the three when I went to Montgomery after they were apprehended, and that was on Monday after this happened on Thursday.

The only other eyewitness to the alleged robbery who testified for the State, was the above mentioned young woman, Miss McFall. Her testimony as to the robbery, was practically identical with the above narrated testimony of Eades, the alleged injured party.

The foregoing testimony as to the actual robbery was without dispute or conflict. The defendant's contention was, and is, that the alleged robbery was committed by and with the consent of Eades, who had prearranged with defendants that a fake hold up be had. Appellant Hutter, being the only eyewitness for defendants, testified in detail as to this. Among other things, defendant Hutter testified, "I was present in Baldwin County, Alabama, on the 12th day of June, 1941, when some money was taken off Mr. Eades; that was $1520.00. There was not five one hundred dollar bills in it; there were four one hundred dollar bills in there." * * * "I had one of those one hundred dollar bills when I was arrested. I don't know whether or not Mr. Gable had one of those one hundred bills in his possession at the time. I know I had one of the one hundred dollar bills that come off Mr. Eades' person. Mr. Gable and I had already divided up the money, we split even. I got $760.00 out of the deal. I don't remember now whether or not I got more than one of those one hundred dollar bills. It was all in currency."

* * * "I was in the car at the time the money was taken off Mr. Eades, and Mr. Gable was on the back seat. We all had guns. Mr. Gable had the nickel-plated shiny gun."

From the foregoing respective insistences it is clearly apparent that the controlling and conclusive question in this case is one of fact for the jury to determine. As stated, the evidence for the State, if believed under the required rule, as to measure of proof, makes out the case in its every detail, and shows a clear and aggravated case of robbery.

If the contention of the defendants is the correct one, there could be no conviction of the offense of robbery, for in order to constitute that offense there must be not only a felonious taking of the property alleged, but such taking must be against the will of the person robbed, or by violence to his person, or putting him in such fear as unwillingly to part with the same.

Upon the trial in the court below, and here on appeal, these two defendants are represented by two of the ablest and most prominent firms of Attorneys in this State. Both firms have filed copious and elaborate briefs on appeal wherein it is insisted that upon the trial of this case, in the court below, numerous rulings of the trial judge constituted reversible error. These insistences are grouped under several heads.

The first proposition presented relates to the following occurrence as shown by the record, viz.:

> "The State closed. The defendant closed. The solicitor for the State, while arguing the case to the jury made the following statement: 'Now, gentlemen of the jury, wouldn't it be unusual for Eades to have a stranger to come to Baldwin County and rob him; that's what Hutter says. All you have to consider as to the framed robbery is the testimony of Mr. Eades against that of Mr. Hutter—Gable didn't take the stand and I can't comment on that.'

"Whereupon the following proceedings were had:

'"He said Gable didn't take the stand, and we want to object to the gentleman making that statement to the jury.'

"Solicitor for the State: 'I said I couldn't comment on it.'

"Counsel for Defendants: 'We object on the ground he is calling it to the attention of the jury without authorization of law, and we ask the court in no unmistakable terms to admonish the jury he didn't have to take the stand. If the other witness, the other defendant took the stand and testified and went through all of it we didn't have to go through the whole thing again.'

"By the Court: 'Yes, gentlemen, a defendant has the option as to whether or not he will take the stand in the trial and no adverse presumption arises as a matter of law because of his failure to take the stand; and it is not proper subject of comment by counsel either for the State or the defendant.' "

It will be noted that the trial court ruled with the defendant as above quoted. No other ruling in this connection was invoked, but on the motion for a new trial this matter was made the basis of the 16th ground of said motion. This particular ground of the motion for a new trial, as stated therein, is not in strict accord with the above quoted occurrence as shown by the bill of exceptions. On this insistence, or proposition, we are not prepared to put the court to error, or to declare that the cursory, though ill-advised, remark complained of, supra, is within the inhibition of the Statute. The statement complained of appears to have been a mere passing remark of what was already known to the jury, and no further or other comment was made or indulged. The rule governing insistences of this character is clearly stated by our Supreme Court in the case of **Stone v. State**, 105 Ala. 60, 72, where the court said:

"The statute forbids comment in argument of a criminal cause upon the failure of the defendant to testify.—Code, Section 4473. We construe both remarks shown by the bill of exceptions to have been made by the solicitor to be within the inhibition of the statute. But we cannot revise judgments here on account of the sayings and doings of counsel. We review only the action of nisi prius courts. To bring questions growing out of improper arguments of counsel under revision, the trial court must first be appealed to to remedy the wrong by eradicating any effect the argument may have had from the minds of the jury through appropriate instructions given them at the time and otherwise. If the court fails to act upon such appeal being made to it, or acts erroneously, an exception reserved to the act or omission of the court, **and that alone**, will bring the question before us. In this case the exception reserved was to what the solicitor said, and not to what the court did or failed to do."

In numerous other cases the Alabama Courts have held that when the trial court gives the jury proper instructions after a remark that the defendant did not take the witness stand the same is without injury. In **Kilpatrick v. State**, 213 Ala. 358, after the counsel for prosecution had referred to the fact that defendant had failed to testify in his own behalf the court said:

"But the court told the jury that the argument was improper, and that they should not allow it to have any weight in their consideration of the case. We are unable to say that the error of counsel in this case was remediless, or that the court failed to adopt a timely and sufficient corrective, and held therefore, that the removal of counsel furnishes no just ground for reversal."

See also **Watkins v. State**, 21 Ala. App. 585, 111 So. 43, this Court said:

"The solicitor should not have commented upon the fact that defendant did not testify. The court so ruled and emphatically impressed the jury not to consider the statement. We think the court eliminated any injury resulting from the solicitor's remark."

In the case at bar the objection of the defendant's counsel was properly sustained and the jury was told that no adverse presumption should arise. Thus the error of the solicitor, if error prevailed, was obviated. **Lucas v. State,** 24 Ala. App. 468, 137 So. 902, Cert. den. 223 Ala. 667, 137 So. 903; **Curlette v. State,** 25 Ala. App. 179, 142 So. 775.

The next insistence of error is predicated upon the following as shown by the record:

"After the jury was given the case on December 3, 1941, the jury was returned to the court room at about two o'clock P. M., on the afternoon of December 4, whereupon the following proceedings were had:

"By the Court: Gentlemen, is there any question of law that is bothering the jury in any way? If so, I would be glad to assist you in any way I can.

"Juror: Your Honor, Judge, would it be all right for us to go ahead and reach a verdict on two, and then on one if we couldn't reach a verdict could we call a mistrial on that?

"The Court: You could: yes, sir.

"Juror: On the other hand, if we reach a verdict on one could we call a mistrial on the other two?

"The Court: Yes, sir. Anything else?

"Juror: No, sir.

"The Court: All right, you may retire.

"Counsel for Defendants: Judge, I want to note an exception to the instructions of the Court to the jury in the absence of the defendants.

"The Court: Correct you are. Let that jury come back. Let the defendants be brought into court. I had them before dinner, and didn't notice they were not present. Tell that jury to come back.

"Whereupon the jury was brought back into the court room and the defendants were brought from the County Jail where they were being held in custody, into the court room. Thereupon the following proceedings were had—the jury and the defendants at this time being present:

"The Court: Gentlemen, of the jury, one of the attorneys for the defendants has called my attention to the fact that the defendants were not present in court at the time the juror asked two questions a while ago. I sent for you this morning and also sent for the defendants, and it also escaped my attention that they were not present at the time the questions were asked the Court and the answers made by the Court touching the legal questions inquired about, and, as stated that was improper for those questions to be asked in the absence of the defendant, and in order that there may be actually no damage done, I will ask the Juror to repeat those two questions in the words as near as possible as you asked the court a while ago.

"Juror: Does he have a record of it?

"The Court: Yes. I will ask the Reporter to read the questions. Pursuant to the request of the Court, the Court Reporter read the questions propounded by a member of the jury and the instructions of the Court made in response thereto as follows: 'Your Honor, Judge, would it be all right for us to go ahead and reach a verdict on two, and then on one if we couldn't reach a verdict could we call a mistrial on that?'

"The Court: Is that your question?

"Juror: Yes, sir.

"The Court: You could. The answer of the Court to that is that you could. Now read the question, Mr. Reporter.

"Reporter Reads: 'On the other hand, if we reach a verdict on one, could we call a mistrial on the other two?'

"The Court: That your question?

"Juror: Yes, sir.

"The Court: The answer to that is, you could. Is there any other information I could give you?

"Juror: There is another question we want to ask. Was those guns loaded or was they empty when they were arrested in Montgomery?

"The Court: You will have to consult your own recollection as to the evidence in the case. The Court couldn't give you any information at all as to that. You will have to rely on your own recollection as to that.

"The defendants instituted an exception to the Court's instructions to the jury."

As to the foregoing we are unable to see and to hold that prejudicial error to the substantial rights of the defendants inured. The trial court, when attention was called, by defendants' counsel, to the fact that the defendants were not in court, did what he should have done, by having the defendants brought into court, and in their presence and hearing went over again the entire matter complained of, and repeated in their presence, verbatim, what had occurred when their absence was unknown to the trial court. Manifestly, when the court and jury were first consulting, defendants' counsel were aware of the absence of defendants from the court room, though the trial court was not. It was therefore encumbent upon counsel to have informed the court as to this, and not sit quietly by, and then reserve an exception to the court's unintentional action. There is no merit in the exception reserved under the facts and circumstances hereinabove detailed. **Ferguson v. State**, 24 Ala. App. 491 (137 So. 315), Cert. denied, 223 Ala. 521 (137 So. 317).

Under appellants' third proposition it is contended that error prevailed in the action of the court by allowing the State to offer proof by several witnesses of the general good character, and good character for truth and veracity of Eades, the alleged injured party; the insistence is, that

no effort to impeach the testimony of State witness Eades had been made, and that mere contradiction of his testimony by one of the defendants would not justify such ruling. The law, as to this is elementary, and should not require or necessitate the prolonged and elaborate argument in briefs by earnest counsel. The record, however, does not bear out this insistence, as it appears conclusively that in the cross-examination of witness, Eades, the defense sought to impeach the witness by introducing evidence of contradictory statements made by him when testifying at the preliminary trial of this case. The cross-examining counsel for defendants laid predicates to witness Eades as to what he testified to at the preliminary trial, and afterwards introduced the testimony taken at that time to impeach him. Hence, as stated, there was no infringement of the rule, and no error of the court appears as to this. **Dickson v. Dinsmore,** 219 Ala. 353 (122 So. 437). In said case the Supreme Court said:

> "It has long been established in Alabama that one method of impeaching a witness is, after a proper predicate to the witness, to prove that he made a statement contradictory of that given in evidence, and that when there is such nature of impeaching evidence, the party offering the witness has the privilege of supporting his veracity by proof of the general good character of the witness."

See also 167 Ala. 107 (52 So. 732); 214 Ala. 291 (107 So. 437).

Several grounds of the motion for a new trial are based upon the action of the trial court in refusing to defendant numerous purported written charges. These charges as appear in the record and also in the motion for a new trial are no part of the record, and cannot be considered on this appeal, for the reason they bear no endorsement of the trial judge as the Statute requires. Section 273 of Title 7,

Code 1940, provides (pertinent here): "Charges moved for by either party must be in writing, and must be given or refused in the terms in which they are written; and it is the duty of the judge to write 'given' or 'refused,' as the case may be, on the document, and sign his name thereto; **which thereby becomes a part of the record.**" (Emphasis ours.) As will be noted, this section requires the endorsement of the trial judge to make the given or refused charges a part of the record. The fact that the clerk inserts the charges in the record does not make them a part of the record, unless they bear the endorsement of the trial judge as having been given or refused. **Berry v. State**, 231 Ala. 437 (165 So. 97), and cases cited.

Upon examination of the record we find no facts to sustain the 10th ground of the motion for a new trial.

There are numerous other insistences of error in this case. It is impractical and unnecessary to deal specifically in this opinion with each and every one of them, hence we refrain from so doing. We have however carefully examined into, and have given attentive consideration to every exception, and to all points of decision which are here presented, and in none of them do we find any error of a reversible nature. This statement is incorporated here for the purpose (if they so desire), and review by certiorari is had, the appellants may not be precluded from presenting to the Supreme Court again, the action of the trial court in every instance where exception was reserved to the rulings complained of. This case is unusual in that there is no denial that the act complained of was in fact committed by these two parties, at the time and place designated. Therefore, as stated, hereinabove, the controlling and conclusive question was one of fact for the jury to determine. The trial judge was fair in every respect; this is clearly apparent, and, as stated, we have discovered no ruling of the court the tendency of which could or did militate against or prevent the jury in its

deliberations on this crucial point, this sole question of fact, from deciding the case as the law provides, requires and demands. As we see and understand this case if any technical case occurred upon the trial, although we have discovered none, the provisions of Supreme Court Rule 45 should be applied. The rule provides:

> "Hereafter no judgment may be reversed or set aside, nor new trial granted by this court or by any other court of this state, in any civil or criminal case on the ground of misdirection of the jury, the giving or refusal of special charges or the improper admission or rejection of evidence, nor for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken, or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."

The judgments of conviction from which these appeals were taken are affirmed.

Affirmed.

APPENDIX B.

(Judgment Denying Writ of Certiorari.)

The Supreme Court of Alabama

* * * * * * *

Thursday, October 28, 1943.

The Court Met Pursuant to Adjournment.

Present:

Chief Justice Gardner and Associate Justices Thomas, Bouldin, Brown, Foster, Livingston and Stakely.

1 Div. 208

Ex parte:

Charlie Hutter and Fred Gable

Petition for Certiorari to Court of Appeals

(In re: Charlie Hutter and Fred Gable
vs. State of Alabama.)

Come the Petitioners by attorneys, and the Petition for the Writ of Certiorari to the Court of Appeals being submitted on briefs and duly examined and understood by the Court, it is considered and ordered that said petition be and the same is hereby denied at the cost of the Petitioner.

(Opinion of Supreme Court)

The State of Alabama * * * Judicial Department

The Supreme Court of Alabama

October Term, 1943-44.

1 Div. 208

Ex parte:

Charlie Hutter and Fred Gable

in re:

Charlie Hutter and Fred Gable

vs.

State of Alabama

Petition for Certiorari to Court of Appeals.

Per Curiam:

We do not find ourselves in accord with the suggestion in the opinion of the Court of Appeals that the remark of the solicitor as to the failure of one of the defendants to testify did not infringe on our statute. Title 15, Sec. 305; **Kilpatrick v. State**, 213 Ala. 358, 104 So. 656. But considering the remark improper, we are persuaded the opinion discloses that the trial court in regard thereto applied a timely and appropriate corrective, and, of consequence, no error to reverse appears.

No other portion of the opinion calls for comment.

The writ is due to be denied.

Writ denied.

All Justices concur.

APPENDIX C.

Sec. 389. Assignment or joinder of error unnecessary; duty of Court.—In cases taken to the Supreme Court or Court of Appeals under the provisions of this chapter, no assignment of errors or joinder in errors is necessary; but the Court must consider all questions apparent on the record or reserved by bill of exceptions, and must render such judgment as the law demands. But the judgment of conviction must not be reversed because of error in the record, when the Court is satisfied that no injury resulted therefrom to the defendant.

APPENDIX D.

Sec. 6. That in all criminal prosecutions the accused has a right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation; and to have a copy thereof; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to testify in all cases, in his own behalf, if he elects so to do; and in all prosecutions by indictment a speedy, public trial by an impartial jury of the county or district in which the offense was committed; and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty or property, except by due process of law; but the Legislature may, by a general law, provide for a change of venue at the instance of the defendant in all prosecutions by indictment, and such change of venue, on application of the defendant, may be heard and determined without the personal presence of the defendant so applying therefor; provided, that at the time of the application for the change of venue the defendant is imprisoned in jail or some legal place of confinement.

(13)

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

FRED GABLE, CHARLIE HUTTER,
Petitioners,

vs.

STATE OF ALABAMA.

No. 749

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

WILLIAM N. McQUEEN,
Acting Attorney General.

JOHN O. HARRIS,
Assistant Attorney General,
Counsel for the State.

BERNARD F. SYKES,
Assistant Attorney General,
On the Brief.

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Proposition I 6

The due process clause in the Fourteenth Amendment to the Constitution of the United States does not guarantee to an accused on trial in a state court a right to uninterrupted and absolute presense at all stages of his trial but only guarantees a fair trial, and a fair hearing, and a fair opportunity to be heard.

Proposition II 7

When instructions are given to a jury in the absence of accused but have been adequately covered by a prior oral charge and also are immediately repeated in the presence of accused, and the record affirmatively shows that there is no possibility of prejudice there is not a deprivation of life or liberty without due process of law within the meaning of the Fourteenth Amendment.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

FRED GABLE, CHARLIE HUTTER,
Petitioners,

vs.

STATE OF ALABAMA.

No.....

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A

STATEMENT OF MATTER INVOLVED

The statement of the matter involved as it appears on pages 1 through 3 in petitioner's brief is substantially correct, but materially incomplete.

In order that this Honorable Court may not be misled by counsels' omission, and since the Court

should have a less fragmentary summary in mind at the outset of its consideration of the petition, we wish to extend the quotation begun on page two of petitioner's brief for the purpose of including the remedial action or procedure that was instantly adopted by the trial court at the time the alleged error occurred. We quote from pages 100, 101 and 102 of the printed record, being part of the bill of exceptions of the original record:

> "After the jury was given the case on December 3, 1941, the jury was returned to the court room at about two o'clock p. m., on the afternoon of December 4, whereupon the following proceedings were had:
>
> "By the Court: Gentlemen, is there any question of law that is bothering the jury in any way? If so, I would be glad to assist you in any way I can.
>
> "Juror: Your Honor, Judge, would it be all right for us to go ahead and reach a verdict on two, and then on one if we couldn't reach a verdict could we call a mistrial on that?
>
> "The Court: You could; yes, sir.
>
> "Juror: On the other hand, if we reach a verdict on one could we call a mistrial on the other two?

"The Court: Yes, sir. Anything else?

"Juror: No, sir.

"The Court: All right, you may retire.

"Counsel for Defendants: Judge, I want to note an exception to the instructions of the Court to the jury in the absence of the defendants.

"The Court: Correct you are. Let that jury come back. Let the defendants be brought into court. I had them before dinner, and didn't notice they were not present. Tell that jury to come back.

"Whereupon the jury was brought back into the court room and the defendants were brought from the County Jail where they were being held in custody, into the court room. Thereupon the following proceedings were had —the jury and the defendants at this time being present:

"The Court: Gentlemen, of the jury, one of the attorneys for the defendants has called my attention to the fact that the defendants were not present in court at the time the (fol. 75) juror asked two questions a while ago. I sent for you this morning and also sent for the de-

fendants, and it also escaped my attention that they were not present at the time the questions were asked the Court and the answers made by the Court touching the legal questions inquired about, and, as stated that was improper for these questions to be asked in the absence of the defendant and in order that there may be actually no damage done, I will ask the juror to repeat those two questions in the words as near as possible as you asked the court a while ago.

"Juror: Does he have a record of it.

"The Court: Yes. I will ask the Reporter to read the questions.

"Pursuant to the request of the Court, the Court Reporter read the question propounded by a member of the jury and the instructions of the Court made in response thereto as follows: 'Your Honor, Judge, would it be alright for us to go ahead and reach a verdict on two, and then on one if we couldn't reach a verdict could we call a mistrial on that?'

"The Court: Is that your question?

"Juror: Yes, sir.

"The Court: You could. The answer of the Court to that is that you could. Now read the question, Mr. Reporter.

"Reporter Reads: On the other hand, if we reach a verdict on one, could be call a mistrial on the other two?

"The Court: That your question?

"Juror: Yes, sir.

"The Court: The answer to that is, you could. Is there any other information I could give you?

"Juror: There is another question we want to ask. Was those guns loaded or was they empty when they were arrested in Montgomery.

"The Court: You will have to consult your own recollection as to the evidence in the case. The Court couldn't give you any information at all as to that. You will have to rely on your own recollection as to that.

"The defendants instituted an exception to the Court's instructions to the jury.

"Whereupon the jury retired for further consideration of the verdict."

The concluding part of the colloquy may now be observed in its proper place.

B

BRIEF AND ARGUMENT

It is the purpose of our argument to show that:

I

THE DUE PROCESS CLAUSE IN THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT GUARANTEE TO AN ACCUSED ON TRIAL IN A STATE COURT A RIGHT TO UNINTERRUPTED AND ABSOLUTE PRESENCE AT ALL STAGES OF HIS TRIAL BUT ONLY GUARANTEES A FAIR TRIAL, AND A FAIR HEARING, AND A FAIR OPPORTUNITY TO BE HEARD.

Rule 45, Supreme Court of Alabama

Howard v. Kentucky, 200 U. S. 164, 50 L. Ed. 421, 26 S. Ct. 189

Frank v. Mangum, 237 U. S. 309, 50 L. Ed. 969, 35 S. Ct. 582

Johnson v. U. S., 318 U. S. 189, 87 L. Ed. 704, 63 S. Ct. 549

144 *A. L. R.* 199

Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674

Hopt v. Utah, 110 U. S. 574, 28 L. Ed. 262, 4 S. Ct. 202

Schwob v. Berggren, 143 U. S. 442, 36 L. Ed. 218, 12 S. Ct. 525

Lewis v. United States, 146 U. S. 370, 36 L. Ed. 1011, 13 S. Ct. 136

Whittaker v. State, 173 Ark. 1172, 294 S. W. 397

Lowman v. State, 80 Fla. 18, 85 So. 166

Section 6, Constitution 1901

II

WHEN INSTRUCTIONS ARE GIVEN TO A JURY IN THE ABSENCE OF ACCUSED BUT HAVE BEEN ADEQUATELY COVERED BY A PRIOR ORAL CHARGE AND ALSO ARE IMMEDIATELY REPEATED IN THE PRESENCE OF ACCUSED, AND THE RECORD AFFIRMATIVELY SHOWS THAT THERE IS NO POSSIBILITY OF PREJUDICE THERE IS NOT A DEPRIVATION OF LIFE OR LIBERTY WITHOUT DUE PROCESS OF LAW WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT.

Sandusky Cement Co .v. Hamilton, C C A Ohio 1923, 287 F. 609, Cert. den. (1923) 262 U. S. 759, 67 L. Ed. 1219, 43 S. Ct. 705

People v. La Munion, 64 Mich. 709, 31 N. W. 593

State v. Nardella, 108 N. J. L. 148, 154 Atl. 834

Felts v. Murphy, 201 U. S. 123, 50 L. Ed. 689, 26 S. Ct. 366

Ferguson v. State, 24 Ala. App. 491, 137 So. 315, Cert. den. 223 Ala. 521, 137 So. 317

McNutt v. State, 25 Ala. App. 129, 142 So. 773

Boyd v. State, 153 Ala. 41, 45 So. 591

Ray v. U. S., 114 F. 2d 508, Cert. den. 311 U. S. 709, 85 L. Ed. 461, 61 S. Ct. 318

Rule 45, Supreme Court of Alabama.
Title 7, Rule 45, Code of Alabama 1940

Whittaker v. State, 173 Ark. 1172. 294 S. W. 397

Lowman v. State, 80 Fla. 18, 85 So. 166

144 *A. L. R.* 199

Lee v. State, 13 So. 2d 583, 591

Title 30, Section 100, Code of Alabama 1940

Johnson v. U. S., 318 U. S. 189, 87 L. Ed. 704, 63 S. Ct. 549

Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674

I

An examination of the opinion of Bricken, P. J., of the Court of Appeals of Alabama shows that the trial court's judgment of conviction, insofar as the point raised by the petition for certiorari is concerned, was affirmed upon two and only two grounds: (See pp. 37 and 39-40 of Petitioner's Brief)

1. The absence of accused during instruction of the jury would not have occurred had his counsel —who was present—suggested their absence to the trial judge.

2. The instructions inadvertently given in defendant's absence were cured by an immediate repetition of the instructions in defendant's presence, and the occurrence did not injuriously affect de-

fendant's substantial rights. Rule 45 Supreme Court of Alabama.

Neither the occurrence at the trial nor the judgment and opinion of the Court of Appeals deprived the accused of any right that he may claim under the due process clause of the Fourteenth Amendment. Those fundamental and basic rights protected by the Fourteenth Amendment and framed to protect persons from arbitrary and unfair procedure in the state courts do not include the right to be present at each and every stage of a criminal trial in a state court. *Howard v. Kentucky*, 200 U. S. 164, 50 L. Ed. 421, 26 S. Ct. 189; *Frank v. Mangum*, 237 U. S. 309, 50 L. Ed. 969, 35 S. Ct. 582; *Johnson v. U. S.*, 318 U. S. 189, 87 L. Ed. 704, 63 S. Ct. 549. See also 144 *A. L. R.* 199.

To determine whether there is a right to be present at each individual stage of the trial in a state court we must look not only to the words of the State Constitution, statutes, and their constructions—but also to the words of the Foureenth Amendment and to the rights previously enumerated in the Federal Constitution that have been held to be absorbed by the concept of due process in the Fourteenth Amendment. It is significant to note that the Constitution of Alabama, 1901 (see Appendix D, p. 44 of Petitioner's Brief) does not expressly provide for the presence of accused at all stages of the trial. Section 6, Constitution of Alabama 1901. While we do not contend that the accused may be absent from his trial, nor that the Alabama Consti-

tution fails to require such presence, nor that the absence of accused at an important step in the trial must not in ordinary cases require a reversal; we do contend that it is the law in Alabama that occasional absence of the accused may be cured by immediate action by the trial court and by the application of Rule 45 of the Alabama Supreme Court. (Petitioner's Brief, p. 40). That is what the opinion of the Alabama Court of Appeals decides, and the Supreme Court must be bound by this exposition of the law of the State. *Howard v. Kentucky*, 200 U. S. 164, 50 L. Ed. 421, 26 S. Ct. 189.

The petitioner, however, having failed to show his deprivation of due process as that term is used in the State Constitution is now seeking protection from the rights protected by the Fourteenth Amendment. Does the Federal Constitution guarantee the accused an absolute right to uninterrupted presence at his trial in a state court without reasonable exceptions? The construction previously given to the Fourteenth Amendment indicates clearly that no such absolute right is contained in the due process clause of the Fourteenth Amendment.

The decision rendered by this court in 1906 should be controling. In *Howard v. Kentucky*, 200 U. S. 164, 50 L. Ed. 421, 26 S. Ct. 189, it appears that the accused was convicted for the capital crime of murder; a juror was questioned by the trial court in the absence of accused and his counsel and this juror was discharged. The accused by writ of error

complained that he was not accorded due process of law guaranteed by the Fourteenth Amendment. This Court said:.

> "It is manifest, therefore, that it is the law of Kentucky that occasional absence of the accused from the trial from which no injury results to his substantial rights, is not reversible error. And we think, in applying that rule to the case at bar, plaintiff in error was not deprived of due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States."

In short—occasional absence of accused without injury does not invoke the protection included in the Fourteenth Amendment.

Again in *Frank v. Mangum*, 237 U. S. 309, 59 L. Ed. 969, 35 S. Ct. 582, the Supreme Court had an analogous question to decide. This language from the opinion is apt:

> "It is insisted that the enforced absence of Frank at that time was not only a deprivation of trial by jury, but was equally a deprivation of due process of law within the meaning of the amendment, in that it took from him at a critical stage of the proceeding the right and opportunity to be heard. But repeated decisions of this court have put it beyond the range of further debate that the 'due process' clause of the

> 14th Amendment has not the effect of imposing upon the states any particular form or mode of procedure, *so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal, are not interfered with.* Indictment by grand jury is not essential to due process * * * (cases cited) * * * Trial by jury is not essential to it, either in civil cases * * (cases cited) * * or in criminal * * * (cases cited) * *" (Emphasis ours.)

Justice Holmes, although dissenting, concurred with the majority opinion so far as the question of the accused's presence was concerned:

> "* * * We never have been impressed by the argument that the presence of the prisoner was required by the Constitution of the United States."

Though the case of *Snyder v. Massachusetts*, 291 U. S. 97, 78 L. Ed. 674, relied upon by petitioner, is easily distinguishable from the case at bar, a careful reading of Justice Cardozo's opinion shows that the accused's uninterrupted presence at his trial in a state court is not a right protected by the Fourteenth Amendment especially when no substantial rights are injured.

In the *Snyder case*, supra, it is to be noted that the injurious effects of accused's absence were taken into consideration by this court as a controling fac-

tor. We also point out the following excerpts from the opinion that are authority for our position:

> "We *assume* in the aid of the petitioner that in a prosecution for a felony the defendant has the privilege under the 14th Amendment to be present in his own person *whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.*" (Emphasis supplied)

> "Nowhere in the decisions of this court is there a dictum, and still less a ruling, that the 14th Amendment assures the privilege of presence when presence would be useless or the benefit but a shadow."

> "So far as the 14th Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."

> "There can be no sound solution without an answer to the question whether in the particular conditions exhibited by the record the enforced absence of the defendant is so flagrantly unjust that the Constitution of the United States steps in to forbid it."

From the *Snyder case*, supra, we may state the rule to be: That the uninterrupted presence of the

accused at his trial or its incidents is not an unqualified element of due process required by the Fourteenth Amendment, that presence is an element of due process only when absence under the particular circumstances of the case amounts to a denial of a *fair hearing*. Absence at a particular time during a trial or during its incidents may or may not amount to a denial of a fair hearing or opportunity to be heard. It is only when absence amounts to a denial by the state of a *fair hearing* that the Fourteenth Amendment requires presence.

> "What is fair in one set of circumstances may be an act of tyranny in others. This court has not yet held that even upon a trial in court the absence of a defendant for a few moments while formal documents are marked in evidence will vitiate a judgment." *Snyder v. Massachusetts, supra.*

The footnote to this statement contains this comment:

> "What was said in Hopt v. Utah, 110 U. S. 574, 28 L. Ed. 262, 4 S. Ct. 202, supra, and Schwob v. Berggren, 143 U. S. 442, 36 L. Ed. 218, 12 S. Ct. 525, supra, on the subject of the presence of a defendant was dictum and nothing more. See p. 323, supra, of this opinion. We may say the same of Lewis v. United States, 146 U. S. 370, 36 L. Ed. 1011, 13 S. Ct. 136, supra, with the added observation that it deals with

the rule at common law and not with constitutional restraints. There are decisions in the state courts that a conviction will stand even though rulings have been made by the trial court in the absence of the defendant if it appears that they could not by any possibility have resulted to his hurt. Whittaker v. State, 173 Ark. 1172, 294 S.W. 397; Lowman v. State, 80 Fla. 18, 85 So. 166."

An inquiry into the record, therefore, is necessary to determine whether a fair hearing has been denied.

We shall now show that under the particular facts of this case petitioner was not denied a fair hearing, and hence that the Fourteenth Amendment and Federal jurisdiction are not now available to petitioner.

II

In showing that no substantial injury was caused the defendants in the trial below we call this court's attention to these points:

1. During the oral charge given by the trial judge which included the following statement as shown by the record the defendants were present and accompanied by their counsel: (Printed record p. 121-122)

"Now, gentlemen, if you are convinced

from the evidence beyond all reasonable doubt, and to a moral certainty, that one or more of these defendants are guilty, as stated, it would be your duty to bring in a verdict of guilty. And you will consider each case individually. In other words, you will determine whether or not Gable is guilty or innocent, whether or not Glenn Townes is guilty or innocent and whether or not Charlie Hutter is guilty or innocent, weighing the testimony with respect to each defendant separately and individually. And before you can arrive at a verdict of guilty or a verdict of not guilty with respect to any one of them or all of them the minds of all twelve of the jurors must come together and agree. In other words, if some one or more of you were convinced that the defendants, one or more, are guilty, and others not convinced, there would be no verdict either of guilty or not guilty, but a mistrial with respect to one or more of the defendants, because there can be no verdict either of guilty or not guilty unless each individual juror's mind merges and coincides with the other jurors in the case."

When the above oral instruction was given to the jury the defendants were not in jail. Defendants and counsel were present in open court and not one breathed an objection. A comparison of the above quoted oral charge with the instructions given in defendants' absence shows that both are more than substantially the same, their substance is identical. An inspection of the record as a whole shows

that at the time the instructions were given in defendants' absence the substance of those instructions had already been given in open court. Nothing new was added when the same instructions were given in defendants' absence.

Opposing counsel would probably contend that regardless of the previous giving of the identical instruction defendants had the *privilege* to hear the ones given in his absence. This *privilege* for which counsel contends is a privilege, the benefit of which would be "but a shadow." *Snyder v. Massachusetts*, supra.

It has often been held that repetition of matter in defendants' absence that adds nothing new to matter previously covered is no ground for reversal. *Sandusky Cement Co. v. Hamilton*, C C A Ohio 1923, 287 F. 609, cert. den. (1923) 262 U. S. 759, 69 L. ed. 1219, 43 S. Ct. 705; *People v. La Munion*, 64 Mich. 709, 31 N. W. 593; *State v. Nardella*, 108 N. J. L. 148, 154 Atl. 834. And in *Felts v. Murphy*, 201 U. S. 123, 50 L. ed. 689, 26 S. Ct. 366, this court indicated that when the accused does not hear the testimony at the trial the proper procedure is to repeat such testimony to the accused.

2. Counsel's brief (p. 22-23) would have this court believe that the trial judge was surreptitiously instructing the jury and was caught by defense counsel arriving and making his objection at the pronouncement of the last syllable of the instruc-

tions (petitioner's brief p. 22-23). This was obviously not the case. The judgment entry recites that counsel were present at every stage of the proceedings (R. 133-134). The bill of exceptions shows no contradiction of this fact. We must assume, therefore, that counsel were present in open court during the giving of the instructions in defendants' absence. Can we assume that counsel did not know that his clients were absent? If the injury caused to the defense was as grievous as counsel now contends, was that not obvious to counsel at the beginning of the instructions? Can we assume that counsel (two of the ablest and most prominent firms of attorneys in this State—R. 139) were ignorant of the necessity of the personal presence of the accused? Counsel excepted to the instructions it is true, but counsel did not object to the jury being re-instructed in defendants' presence. Counsel did not move for a mistrial; and the only reason we are able to assign is that the substance of the juror's questions indicated that it was probable that two of the defendants would be acquitted. Counsel did not want a mistrial at this point, but quite naturally speculated on a verdict of acquittal for two out of three of the defendants. We are not trying to criticize counsel, but merely call the court's attention to these matters because we believe that the allegedly grievous injury so earnestly insisted upon by counsel is but a "mere afterthought." Counsel, by not moving for a mistrial, allowed the jury to proceed to a verdict.

In *Johnson v. U. S.*, 318 U. S. 189, 87 L. ed. 704, 63 S. Ct. 549, this court said:

> "We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him."

When counsel finally called the court's attention to the fact that defendants were absent the record shows that so far as the trial judge was concerned it was mere inadvertence. He said, "Correct you are." The defendants were then brought to court and the incident was carefully explained to all of them. The instruction was repeated verbatim in their presence. The record shows that the instructions and questions were identical. No attempt is made by counsel to show otherwise.

Where, then, is the injury? Were the accused deprived of their right to be confronted by the witnesses or to meet the jury face to face? Were defendants deprived of their right to consult with counsel at the time of the instructions? If so did they not have that right restored to them immediately afterward? They do not contend that the full report of all proceedings is not shown by the record.

The fact that the judge immediately went over the whole matter shows that due process was not denied but by so doing the trial judge emphasized the requirements of due process. He did more than was necessary to insure a fair trial. The record affirmatively and unmistakably shows that defen-

dants could not possibly have been prejudiced by the instructions given in their absence.

We admit that it is the established rule in Alabama and almost every other jurisdiction that defendant must be present at all important steps of his trial. We have not attempted to make an issue of this well established rule, nor dispute cases cited by petitioner in support of it. This rule does not militate against the rule that circumstances preceding, attending, and succeeding an absence may show that there was no possibility of injury to substantial rights, the error if any, being corrected. *Ferguson v. State*, 24 Ala. App, 491. 137 So. 315; cert. den. 223 Ala. 521, 137 So. 317. *McNutt v. State*, 25 Ala. App. 129, 142 So. 773; *Boyd v. State*, 153 Ala. 41, 45 So. 591; *Ray v. U. S.*, 114 F. 2d. 508, certiorari denied 311 U. S. 709, 85 L. ed. 461, 61 S. Ct. 318. Rule 45, Supreme Court of Alabama. Title 7, Rule 45. Code of Alabama, 1940. See also *Whittaker v. State*, 173 Ark. 1172, 294 S. W. 397; *Lowman v. State*, 80 Fla. 18, 85 So. 166.

Reference is here made to a helpful annotation in 144 A. L. R. 199, and cases therein cited dealing with the right of accused to be present in a criminal case during the argument of a question of law. Since the instructions in the case at bar deal purely with questions of law and since counsel were present the cases therein noted are persuasive.

The case of *Lee v. State*, 13 So. 2d. 583, 591, so often quoted by petitioner is readily distinguishable

from this case. The Lee case announced the rule that a defendant in a capital case could not waive his presence at the time the verdict is received. It it to be noted that the jury in that case was discharged and no attempt was made to remedy the error. Further, Alabama statute specifically grants to defendant in criminal cases the right to poll the jury. Title 30, § 100, Code of Alabama, 1940. In the instant case the issue does not relate to the reception of the verdict, neither was there a discharge of the jury before the irregularity was corrected. The element of final and incurable injury caused by the discharge of a jury in no way enters the question now before this court.

CONCLUSION

The particular facts and circumstances of this case show that the only right deprived petitioner is a mere technical right. In relation to the facts and circumstances of this case the right to be present at the time insisted upon would have availed petitioner nothing. Further the whole record shows affirmatively that there was no possibility of prejudice to the several defendants. It is submitted that the record affirmatively shows: 1. A fair and impartial trial; 2. A fair hearing; 3. A fair opportunity to be heard. The conditions of due process within the meaning of the Fourteenth Amendment have been fulfilled.

The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

WILLIAM N. McQUEEN,
Acting Attorney General,

JOHN O. HARRIS,
Assistant Attorney General,

Counsel for the State.

BERNARD F. SYKES,
Assistant Attorney General,

On the Brief.

CERTIFICATE OF SERVICE.

I hereby certify that I have forwarded copy of the foregoing Brief to Hon. G. Ernest Jones, Birmingham, Alabama, Attorney for Petitioner, on this the 12th day of April, 1944.

WILLIAM N. McQUEEN,
Acting Attorney General,

Counsel for State of Alabama.

APPENDIX A

RULE 45 SUPREME COURT OF ALABAMA.

"*Reversals; new trial; error without injury.*—Hereafter no judgment may be reversed or set aside, nor new trial granted by this court or by any other court of this state, in any civil or criminal case on the ground of misdirection of the jury, the giving or refusal of special charges or the improper admission or rejection of evidence, nor for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken, or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."

(17)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

FRED GABLE, CHARLIE HUTTER,
Petitioners,
vs.
STATE OF ALABAMA.
No. 749.

REPLY BRIEF AND ARGUMENT OF PETITIONERS FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

G. ERNEST JONES,
Counsel for Petitioners.

RODERICK BEDDOW,
C. L. HYBART,
Of Counsel for Petitioners.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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A.

A STATEMENT OF MATTER INVOLVED.

The statement of facts in the brief of respondent to the petition correctly quotes the record.

B.

REPLY BRIEF AND ARGUMENT.

It is the purpose of our reply brief and argument to show (a) that the propositions of law advanced by the respondent in its brief are not well taken and (b) to advance supplementary authority and argument in support of point I (original brief on submission, page 13), point II (original brief on submission, page 21) and point III (original brief on submission, page 23).

I.

It is respectfully submitted that the authorities cited by the respondent in support of his proposition I (pages 6 and 7, respondent's brief) do not conflict with our proposition set forth in point I of our original brief.

Rule 45 of the Supreme Court of Alabama (Appendix A, Respondent's Brief page 24) is not applicable by the very terms of the decision of the Supreme Court of Alabama.

In the case of Jones v. State, 125 So. 384, wherein Mr. Justice Bouldin, speaking for the Supreme Court of Alabama, said:

> "We must hold the doctrine of error without injury cannot be extended to denial of constitutional guaranties of this kind." Jones v. State, 125 So. 384.

And Justice Bouldin proceeded to reverse the Court of Appeals of Alabama in its opinion and judgment rendered in the same case and reported in 125 So. 382, wherein it had held that, since the evidence was undisputed, the failure of the Court to submit an issue to the jury was error without injury.

And, as late as 1928, the Court of Appeals of Alabama itself held that the doctrine of error without injury could not be applied in such cases.

In the case of McGee v. State, 117 So. 487, Judge Rice, speaking for the Court, said:

> "This court does not favor reversals of the judgments of the nisi prius courts on technical rulings which work no injury to the appellants. However, orderly procedure and regulated methods in the indictment, trial and conviction or acquittal of those charged with crime, **must** be preserved—otherwise we drift into chaos, thence on into anarchy." McGee v. State, 117 So. 487.

The case of Howard v. Ky., 200 U. S. 164, 50 L. Ed. 421, 26 S. Ct. 189, cited by respondent (page 6 Respondent's Brief), does not support respondent's contention.

In the Howard case the absence complained of referred to a mere preliminary proceeding **before the trial began** and Justice McKenna, in delivering that opinion, specifically pointed out that the absence of defendant occurred before the jury was sworn in and before the defendant was placed in jeopardy. Thus there was no denial of due process of law.

The case of Frank v. Mangum, 237 U. S. 309, 50 L. Ed. 969, 35 S. Ct. 582, has no application here. The distinctions between the principles applicable to a hearing on petition for habeas corpus to secure release from custody upon commitment pursuant to a judgment regular upon its face, and the principles applicable to the review of a case upon direct appeal or application for writ of certiorari, are too obvious to require repetition here.

Leo Frank had had his trial in the nisi prius court of the State of Georgia, had voluntarily absented himself at the time the verdict was rendered, had made no objection thereto in the trial court, had made no motion for new

trial based upon this action of the Court, had appealed to the courts of last resort of the State of Georgia, had made application to the Supreme Court of the United States for writ of certiorari and which was denied. After the judgment had been seasoned and verified by affirmance of all these courts and after he was committed to custody pursuant to that judgment, he applied to the United States District Court in Georgia for a writ of habeas corpus. Clearly, the decision in such a case has no application to the case here under consideration.

Neither does the case of Johnson v. U. S., 318 U. S. 189, 87 L. Ed. 704, 63 S. Ct. 549, have application here.

The alleged denial of due process there consisted of no more than the expulsion of defendant from the court room while counsel for the Government and the defendant were arguing law to the Judge **in the absence of the jury**, and it further appears that the conduct of the Court in this respect was not made the basis of any exception by the defendant. It also appears that this was a minor, noncapital felony.

Yet, the Circuit Court of Appeals in the Johnson case, supra, took particular pains to say:

> "The defendant must be deemed to have the absolute right to hear everything which the jury hears if he is to protect himself. Under such circumstances, his presence bears a relation 'reasonably substantial to his opportunity to defend.' To exclude him from the court room upon such occasions would be to hazard his constitutional rights." Johnson v. U. S., supra, 129 Fed. (2d) 954.

Neither does the case of Snyder v. Mass., 291 U. S. 97, 78 L. Ed. 674, have application here.

The Snyder case, supra, deals with the absence of the defendant upon a "view" by the jury and it was held upon common-law principles that there was no fundamental

right of the defendant to be present at the "view." Thus, his absence at the "view" was not a denial of due process as that term is used in the Federal Constitution.

Nor can the case of Whittaker v. State, 173 Ark. 1172, 294 S. W. 397, have influence in controlling the decision of this case. Since the Whittaker case deals with a mere statutory misdemeanor where the defendant was voluntarily absent upon the reassembling of the jury, at which time the Court admonished the jury as to their duty, which in the absence of a showing in the bill of exceptions, the Supreme Court assumed to be merely the general perfunctory instructions such as, probably, that the jury were not to talk about the case to anyone nor to permit anyone to talk to them about the case, etc. Furthermore, we have seen that the rule making it essential to due process of law that the defendant in a capital case be present at every stage of his trial is subject to considerable relaxation in misdemeanor cases and minor felony cases.

On first blush, the case of Lowman v. State, 80 Fla. 18, 85 So. 166, cited by respondent in support of its proposition I (Respondent's Brief page 7) would seem to have some application. However, upon examination of the case, it appears that the defendant was at large on bond and, while the Court's attention was occupied during the examination of a juror on his voir dire, voluntarily and without notice on the part of the Court, absented himself and returned to the court room without his absence being noticed by the Court until brought to the attention of the Court and the decision in that case is rested upon an estoppel based upon the defendant's own wrong.

Far from supporting the respondent's position, we claim that the case of Hopt v. Utah, 110 U. S. 574, 28 L. Ed. 262, 4 S. Ct. 202, and Lewis v. U. S., 146 U. S. 370, 36 L. Ed. 1011, 13 S. Ct. 136, are directly and unequivocally in support of our point I (Original Brief on Submission, page 13).

Justice Shiras, in the case of Alexander Lewis v. U. S., supra, distinctly held that the presence of the defendant in a capital case at every stage of his trial was an essential element of due process of law which could not be waived by the defendant and that the proceeding of the trial in any respect in the absence of the defendant constituted error to reverse. This is a well-reasoned case and cites abundant authority. It recognizes the right of a defendant to waive his presence in cases of misdemeanor and in some cases of felonies but not in capital felonies. He quotes with approval Blackstone as follows:

> "The natural life cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority:—" 1 Bl. Com. 133.

And further says:

> "The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody to object to unauthorized methods."

Mr. Justice Harlan, in the case of Hopt v. Utah, dealing with a case where the absence occurred prior to the actual beginning of the trial by the jury but while the jury was being examined upon its voir dire by "triers" of the challenges, in a capital case in reversing a judgment of guilty against the defendant, says:

> "We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned

as to the mode by which he may be deprived of his life or liberty and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view, as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures merely upon their own authority.'—1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused; much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation of atonement of the offense committed but the prevention of further offenses of the same kind.—4 Bl. Com. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the Legislature has deemed it essential for the protection of one whose life or liberty is involved in a prosecution for a felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without due process of law required by the Constitution.''—Hopt v. People of Utah, supra.

We have searched the cases very diligently and have failed to find a single decision of the Supreme Court of the United States, or of a court of last resort of any American jurisdiction wherein the Court has upheld a conviction had at a trial on a charge of a capital felony where the defendant was detained in jail at a time when the court was in session with the jury present and the court instructed the jury in the absence of the defendant.

The cases seemed to be unanimous to the effect that **the right of the defendant to be present and hear everything the jury hears is essential to a trial conducted in conformance with the principles of due process of law.**

II.

It is respectfully submitted that the doctrine of error without injury can have no application in this case, and point II of respondent's brief is not well taken.

The case of McNutt v. State, 25 Ala. 129, 142 So. 773, is expressly based upon the principle of estoppel and was a misdemeanor trial. Under the doctrine of the Lee case, supra, it can have no application to a capital felony trial.

The case of Boyd v. State, 153 Ala. 41, 45 So. 591, is analogous to the McNutt case, supra, since it deals with a minor felony and a mere temporary absence of the defendant unnoticed by the Court. We have already pointed out reasons why the cases of Snyder v. Mass., supra, Whittaker v. State, 173 Ark. 1172, 294 S. W. 397, and Johnson v. U. S., supra, are not in point.

We forbear to go further with discussions of the cases cited by the respondent. Upon examination, it is found that they all deal with misdemeanors or minor felonies, or with absences before jeopardy began, or else they fully support our point I as set forth in our original brief on page 13.

III.

In point III of our original brief (page 23) we stated:

> **"The violation of a substantial constitutional right is conclusively presumed to be injury in a trial for a capital felony."**

In the Alabama cases of Jones v. State, supra, McGee v. State, supra, we have pointed out that the courts of last resort in the State of Alabama have held that Rule 45 of

the Supreme Court of Alabama has no application to an invasion of a constitutional right.

Indeed, Rule 45 set forth in appendix A to respondent's brief would be void and unconstitutional itself if it were to be construed in such manner as to be an attempted limitation, modification or abrogation of a constitutional right of a defendant.

By its very terms it purports to deal only with mere technical matters with respect to admission or rejection of evidence, instructions to the jury or rules of pleading or procedure. It makes no pretense to deal with any error with respect to the denial of a constitutional guarantee. The right to be present at the time a jury is instructed is so sacred that it was held in the case of Parfet v. Kansas City Life Insurance Company, 128 Fed. (2d) 361, Certiorari Denied, 63 S. Ct. 50, 317 U. S. 654, 87 L. Ed. 526, error requiring a reversal of a judgment for a court to instruct the jury in a civil proceeding in the absence of the plaintiff in the suit **even though substantial prejudice did not affirmatively appear.**

The Supreme Court of the United States refused to reverse this ruling of the Circuit Court of Appeals of the Tenth Circuit, thereby inferentially affirming it. The Constitution of the State of Alabama is a compact between the state and its citizen wherein certain rights are guaranteed to the citizen which cannot be infringed by acts of the Legislature or of the Courts. The infringement of these solemn covenants constitutes a denial of due process of law and a judgment rendered in violation of these sacred rights cannot be made to stand.

Rule 45 of the Supreme Court of Alabama, appendix A, respondent's brief, page 24, relating to error without injury cannot be made to apply to an invasion of a constitutional right. To permit such application of Rule 45 would permit the state, acting through its agency, to violate its compact with the people without the consent

of the people. The Constitution of Alabama can only be modified by amendments or changes made in accordance with constitutional process. The constitutional right of a defendant in a capital case to be present at his trial cannot be frittered away, whittled down, limited, nor destroyed by mere rules of court. The Constitution of the State of Alabama is like the sacred Ark of the Covenant and no person dare lay impious hands upon it, whether he be Governor, Judge, or Legislator. The right of a defendant to be present at his trial and at every stage of his trial comes to us from the earliest days of the common law with the adoption of Magna Charta. To deny this right is to deny due process of law preserved to every citizen of Alabama by the Constitution of Alabama, and when any officer of the State of Alabama, whether he be Governor, Legislator, or Judge, shall seek to deny this right and shall render a judgment in violation of this right, the Fourteenth Amendment of the Constitution of the United States denounces the act and renders the action null and void. Whither would we travel if we permit the sacred constitutional guarantees of the right to be present at every stage of the trial to be frittered away by rules of court or even the acts of the Legislature. Who will be the **man** to say whether the citizen is injured by the invasion of his constitutional right or whether the public is injured by the ignoring of the constitutional guarantees.

Rule 45 makes no pretense that it applies to invasion of constitutional rights. Its very terms refer to mere procedural matters in the course of the trial. It was adopted for the sole purpose of relieving the courts of the necessity of vacating judgments for mere violations of remedial rules of evidence, procedure and pleading. It was never thought that such a rule could have any bearing upon the consideration of a fundamental right growing out of the Constitution and it is rather astonishing to see the argument advanced that Rule 45 is superior to the Constitution of Alabama and the Constitution of the United States.

We say that the substantial right of the petitioner was injured. It is a substantial right of the defendant to be present at every stage of the trial. It is a substantial right of the defendant to be present when the Court is instructing the jury. It is a substantial right of the defendant not to be detained in jail by the process of the very court from which he is absent at the time the Court is instructing the jury. This right was taken away from him in the trial in the court below by an officer of the court detaining the petitioner in jail and thereby forcibly preventing him from being present when the Court was instructing the jury.

How does he know **what** occurred? How does he know **what** the jury said to the Court? How does he **know** what the Court said to the jury? True, he is **informed** by highly credible evidence as to what was done and said in his absence, but this is not the equivalent of knowledge. Neither is it the equivalent of an opportunity to be heard at the very time and place when the jury was being instructed in the first instance.

The argument of counsel for the State of Alabama in opposition to the petition for writ of certiorari constitutes a confession and attempted avoidance. The invasion of the constitutional right appears substantially confessed and is sought to be avoided.

Yet there is not a single authority cited by learned counsel where the courts have held that a defendant may be forcibly detained in jail at a time when he is on trial for a capital felony and the Court is instructing the jury. The attempt by petitioner to distinguish the Lee Case (13 So. [2d] 583, 591) is not supported by reading of the Lee Case itself. The Lee Case predicates the reversal of the court below upon the violation of the constitutional right to be present at every stage of the trial. No mention is made of Title 30, Section 101, Code of Alabama 1940, in

the decision. The Court of Appeals in rendering its opinion said:

> "The inquiry, then, is whether or not the defendant may—or can—juridically divest himself, by consent or waiver, of this constitutional protection and it has been held to be a constitutional right (State v. Hughes, 2 Ala. 102, 36 Am. Dec. 411; Lewis v. United States, 146 U. S. 370, 374, 13 S. Ct. 136, 137, 36 L. Ed. 1011, 1013; Hopt v. Utah, 110 U. S. 574, 579, 4 S. Ct. 202, 28 L. Ed. 262; Percer v. State, 118 Tenn. 765, 103 S. W. 780; Riddle v. Commonwealth, 216 Ky. 220, 287 S. W. 704) to be personally present when the verdict of the jury is returned. In other words, is his personal presence at the rendition by the jury of the verdict against him in a felony case—here a trial for a capital offense—indispensable to the validity of the proceedings, or can he waive his personal presence during this critical stage of the trial?" Lee v. State, 13 So. (2d) 583-586.

The Supreme Court of Alabama also said in the Lee Case, supra:

> "The right to be present is said to be guaranteed by the Constitution, Section 6, to be heard by himself and counsel, that he may discuss questions of law and fact which may arise and that he may examine the jury by the poll to ascertain if they are certain."

It is thus seen that this right depends upon the Constitution of Alabama and not upon a mere section of the Code of Alabama.

That the invasion of the constitutional right to be present **requires** a reversal without any showing of injury is established also by the Lee Case, supra. There was no showing of injury to the defendant in the Lee Case other than an invasion of his constitutional right, which he had personally waived and to which he had personally con-

sented. The Court very reluctantly reversed the judgment in the Lee Case, evidently convinced that the verdict was not influenced to any degree and that the result was in no sense different from what it would have been had the defendant's constitutional right not been invaded. The Court said:

> "We confess our reluctance in so ruling **here** where a generous and considerate court allowed this unusual procedure to be undertaken as a convenience to the defendant. But the law must rule all cases alike. Consistency in just judicial pronouncements must be maintained. The principle 'stare decisis et non quieta movere' is firmly imbedded in our judicial fabric. Temporal winds of expediency in law trials should not be permitted to invade our fundamental rules." Lee Case, supra.

And the Supreme Court of Alabama in examining this case said:

> "The constitutional safeguard of Section 6, supra, it is also conceded, may be waived in a misdemeanor case, though Section 6 is not limited in its scope.
>
> "(5) The direct and positive assertions of this court in respect to the necessity of defendant's presence to sustain a verdict are but the statement of a universal principle existing in the common law. The right to waive his presence is not involved in any such statement. The question of such right to waive goes deeper in our judicial history than the constitutional provisions and deeper than the effect upon the defendant himself of receiving a verdict in his absence, and it is a rule of public policy inherited from the common law." Lee v. State, 13 So. (2d) 591, 592.

It is, therefore, confidently asserted that each of these petitioners will be deprived of their liberty in violation of due process of law, contrary to the provisions of the

Fourteenth Amendment of the Constitution, if the judgment of conviction here shown to be erroneous is permitted to stand. The presence of the defendant at every stage of his trial is essential under common-law principles to due process; it is essential under Section 6 of the Constitution of Alabama. It is essential to due process of law according to the principle of stare decisis under the decisions of the courts of last resort of the State of Alabama; that it is so essential to due process of law that it does not fall within the scope of Rule 45 of the Supreme Court of Alabama is established by the decisions in the Lee, Jones and McGee Cases, supra. That the doctrine of stare decisis is applicable and required the courts of Alabama to rule upon the instant case in accordance with the principles announced in the long and consistent line of cases is established by the Court of Appeals' decision in the Lee Case and to refuse to these petitioners the application of the doctrine of stare decisis of itself constituted a denial of due process of law.

Respectfully submitted,

G. ERNEST JONES,
Counsel for Petitioners.

RODERICK BEDDOW,
C. L. HYBART,
Of Counsel for Petitioners.

Certificate.

I hereby certify that I have forwarded copy of the foregoing Reply Brief and Argument to the Honorable William N. McQueen, Acting Attorney General, State of Alabama, Montgomery, Alabama, on this the 10th day of April, 1944.

G. Ernest Jones,
Counsel for Petitioners.